DIRECTORS, EMPLOYEES OR INSURERS - WHO'S LIABLE FOR ANTITRUST FINES?

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On 15 January, 2010 the High Court refused to strike out a claim by Safeway (owned by Wm Morrisons Supermarkets plc since 2004) against eleven former directors and employees for damages resulting from infringements of competition law. The directors and employees have been granted leave to appeal to the Court of Appeal.

BACKGROUND

The Office of Fair Trading ("OFT") launched an investigation in January 2005 into price fixing and other possible breaches of competition law by supermarkets and dairy processors. The majority of parties (including Safeway) admitted infringement, entering into settlement agreements with the OFT in December 2007 and February 2008. The OFT's investigation into Tesco and Wm Morrisons (other than in respect of Safeway) continues and no final decision has been reached.

In its judgment, the High Court reports that the penalty to be imposed on Safeway following its early resolution agreement will be £16.4m, which may be reduced by up to 35 percent for co-operation to £10.7m.

Safeway is claiming an indemnity from its former employees in the form of damages and/or equitable compensation on the basis that their actions constituted a breach of their employment contracts and/or fiduciary duties owed to Safeway and/or negligence. It is also claiming a payment of £200,000 in respect of the costs, including legal costs, it incurred in the OFT investigation.

JUDGMENT

The defendants had contended that Safeway's claim was barred for public policy reasons on the following grounds:

(a) the principle of ex turpi causa non oritur action (that someone who has committed an unlawful act cannot seek an indemnity against the liability which arises from that act); and

(b) the claim was fundamentally inconsistent with the UK competition regime.

Mr Justice Flaux held on the first ground that Safeway had a "real prospect of successfully defeating any defence based upon ex turpi causa at trial". This was because Safeway did not have primary liability – the unlawful acts were committed by the individuals in the name of Safeway in the course of their employment. Accordingly, Safeway's liability for the unlawful acts is attributed to the individuals, by virtue of the general law of agency. The defence of ex turpi causa should not therefore apply.

On the second ground, Mr Justice Flaux held that the claimants' case was not novel or revolutionary, but rather was founded on "well-established principles of contract, company law, employment law and tort". Whilst the Competition Act applies to undertakings and not individuals, this did not prevent the individuals owing the company duties on normal common law principles. Mr Justice Flaux went on to say that if Parliament's intention had been to affect these well-established common law remedies against directors and employees, it would have been explicit in the Statute. Mr Justice Flaux concluded that passing on the penalty to those individuals would not be inconsistent with the Competition Act.

Recognising that the assets of the individual defendants would be unlikely to be sufficient to cover a multi-million pound claim such as this, Mr Justice Flaux state that "the real target of the present claim is ... the directors' and officers' liability insurance available to the defendants".

IMPLICATIONS

Competition authorities have long been wrestling with a delicate balancing act between punishment and deterrence when setting anti-trust penalties. In the UK in particular, this has led to a regime which includes both corporate fines and the possibility of individual sanctions, including fines, imprisonment and disqualification of directors. If successful at trial, this case has potentially far reaching implications and could shift that balance significantly. ■

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